STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GOVIT POOCHUAY MAXWELL,

Defendant-Appellant.

UNPUBLISHED
September 30, 2003

No. 240585
Washtenaw Circuit Court
LC No. 01-001017-FH

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with possession with intent to deliver marijuana and possession with intent to deliver less than fifty grams of cocaine within 1,000 feet of school property, MCL 333.7410(3). A search of defendant's residence revealed several bags of marijuana, a digital scale, and empty plastic bags in the living room. A small quantity of marijuana was found on defendant's person, and several rocks of crack cocaine were discovered in a jacket in the living room. A police officer who testified as an expert on the issues of narcotics trafficking, sales, and packaging stated that in his opinion, the amount of cocaine recovered from defendant's residence indicated that the cocaine was intended for sale to others. Sergeant King testified that he advised defendant of his *Miranda*[1] rights, and that defendant waived his rights and made a statement. Defendant admitted that he sold marijuana to students, and that the cocaine found in the residence belonged to him.

The jury convicted defendant of possession with intent to deliver marijuana, but was unable to reach a verdict on the charge of possession with intent to deliver less than fifty grams of cocaine within 1,000 feet of school property. The trial court declared a mistrial on that charge. The trial court sentenced defendant to two years' probation, with the first year in jail.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant argues that trial counsel rendered ineffective assistance by failing to move to suppress the statement he allegedly gave to King just after he was arrested. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*., 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. The prosecution may not use a custodial statement unless it demonstrates that prior to questioning, the accused was informed of his rights. *Id*., 444. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody or deprived of his freedom in a significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). To determine whether the person was in custody at the time of interrogation, the court must look at the totality of the circumstances to ascertain whether the defendant reasonably believed that he was not free to leave. *Id.*

Defendant maintains that he told trial counsel that he did not make any statement to the police. If a defendant's claim is that he did not make any statement to the police, as opposed to a claim that he made an involuntary statement, the question of whether the defendant made a statement at all is properly left for the jury. *People v Weatherspoon*, 171 Mich App 549, 554; 431 NW2d 75 (1988). Trial counsel's failure to seek a *Walker*[2] hearing did not result in prejudice to defendant because the trial court would have left the issue for the jury.[3] *Weatherspoon*, *supra*. Trial counsel's decision was sound trial strategy under the circumstances. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The trial court instructed the jury that it was required to determine if defendant made the statement he was alleged to have made, and that if it determined that defendant did not make the statement, it could not consider the contents of the alleged statement. The jury was entitled to accept King's testimony that defendant made a statement. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has failed to show that but for counsel's error, the result of the proceedings

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] Defendant has not shown that had he alleged that he made an involuntary statement it is likely the trial court would have suppressed the statement. *Givans*, *supra*. An officer's misrepresentation of a fact is not sufficient, in and of itself, to render a statement involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). Defendant does not specify what misinformation he was given by King.

would have been different, *Carbin*, *supra*, and has failed to overcome the presumption that counsel rendered effective assistance. *Rockey*, *supra*.

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Milstead*, *supra*. A trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The corpus delicti rule requires that a preponderance of direct or circumstantial evidence independent of the defendant's inculpatory statement establish the occurrence of a specific injury and criminal agency as the source of the injury before the statement may be admitted as evidence. *People v Burns*, 250 Mich App 436, 439; 647 NW2d 515 (2002).

In order to establish that defendant possessed marijuana with the intent to deliver it the prosecution was required to show that: (1) defendant knowingly possessed marijuana; (2) defendant intended to deliver the marijuana to someone else; and (3) the substance possessed was marijuana and defendant knew that it was. CJI2d 12.3.

Defendant argues there was insufficient evidence independent of his statement to establish the intent element of the charge of possession with intent to deliver marijuana. We disagree. Defendant did not object to the admission of his statement on this ground; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Possession with intent to deliver is a specific intent crime. The requisite intent can be shown from the facts and circumstances surrounding the event. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983). Evidence independent of defendant's statement showed that several bags of marijuana, a digital scale, and empty plastic bags were found in defendant's residence. The jury could infer from this evidence that defendant intended to divide the marijuana into smaller quantities and deliver it to others. *Id*; *Vaughn*, *supra*. King's testimony regarding defendant's statement was introduced only after other evidence established the intent element. *Burns*, *supra*. No plain error occurred. *Carines*, *supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder